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Supreme Court, U.S.
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No. 03-866

IN THE

Supreme Court of the United States

DARLIE LYNN ROUTIER,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF TEXAS

REPLY BRIEF

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

I. The Question Before the Court Has Great Importance to the Procedural Rights of Criminal Defendants Whose Trial Records are Lost or Disputed. 1

II. Due Process Is Not Satisfied When a Court Denies a Criminal Defendant the Opportunity to Participate in the Reconstruction of a Seriously Disputed Trial Record. 3

Conclusion 6

TABLE OF CITED AUTHORITIES

Page

Cases:

Chessman v. Teets,
354 U.S. 156 (1957) ..... *passim*

Jessup v. State,
2003 WL 22903017 (Tex. App. Dec. 11, 2003) ... 3

Markowitz v. Markowitz,
118 S.W.3d 82 (Tex. App. 2003) 3

Routier v. State,
112 S.W.2d 554 (Tex. Crim. App. 2003) 2, 3, 6

United State v. Farley,
292 F.2d 789 (2d Cir. 1961) 2

Zavala v. State,
2004 WL 491132 (Tex. App. March 11, 2004) .. 3

Respondent's Brief in Opposition posits that Petitioner's question presented is (1) "unworthy" of this Court's attention and (2) that, in any event, Petitioner received all the due process to which she was entitled. Respondent's arguments are unpersuasive.

I.

The Question Before the Court Has Great Importance to the Procedural Rights of Criminal Defendants Whose Trial Records are Lost or Disputed.

This Court established in *Chessman v. Teets*, 354 U.S. 156 (1957), that a criminal defendant is entitled to due process in establishing a disputed trial record. It is unsettled, however, as to what such due process requires. The State makes much of the fact that this Court "has never held that . . . , 'notice' is constitutionally required in such a proceeding. Nor has this Court ever held that a petitioner such as Routier is entitled to an evidentiary hearing on a transcript reconstruction matter." Opposition at 13. Respondent is correct: this Court has not so held, because it has never explained the procedural standards required by *Chessman*. Should this issue be left to the judgment of the Texas Court of Criminal Appeals, procedural due process will not require the notice necessary to conduct adequate review of a reconstructed transcript. Nor will criminal defendants such as Petitioner be guaranteed the fundamental rights to cross-examine adverse witnesses and present testimony in their favor. The state appellate court's opinion severely undermines the right to procedural due process required under *Chessman*.

The Second Circuit, the only federal appellate court to have directly addressed the issue, has suggested that a

"full hearing" including the opportunity to cross-examine witnesses and present testimony is required in to order comply with *Chessman*. *United States v. Farley*, 292 F.2d 789, 792 (2d Cir. 1961) (due process requirement of *Chessman* was satisfied when trial court, upon remand for settlement of the record, conducted a three-day hearing including testimony from and cross-examination of the stenographer who prepared the corrected record, as well as testimony by defendant, defendant's attorney, the government's attorney, original trial judge and witness from original trial). There is no question that Petitioner was denied a "full hearing" in this case. To the contrary, the trial court perfunctorily canceled the hearing scheduled for September 8, 2000, the *only* hearing at which Petitioner would have been allowed to question Susan Simmons directly or to call witnesses of her own. Moreover, the trial court specifically chose to ignore Petitioner's written objections to the final certified record, finding instead that Petitioner had adequately preserved her claims for appeal. Petitioner therefore was not afforded a hearing on her detailed objections and disputed factual questions to the reconstructed record, including those relating to the uncertified 53 pages of the record containing matters of crucial importance to her trial counsel's actual conflict of interest.

Should this Court deny certiorari in this instance, it runs the risk of exposing numerous criminal defendants to denigration of their constitutional right to due process. Petitioner's situation can hardly be characterized as "most unusual," as Respondent suggests. To the contrary, disputes regarding inadequacy of the official reporter's record arise with some frequency. In Texas alone, at least three appellate courts have addressed issues related to missing or incomplete reporter's records following the Court of Criminal Appeals' decision in *Routier*, which is now settled law in

that state.[1] Certiorari should be granted in this case both to clarify the requirements necessary to satisfy due process under *Chessman* and to correct the state appellate court's fundamental misapplication of the procedural due process standard.

II.

Due Process Is Not Satisfied When a Court Denies a Criminal Defendant the Opportunity to Participate in the Reconstruction of a Seriously Disputed Trial Record.

The Opposition seeks to divert the Court's attention from these fundamental deprivations of Petitioner's procedural due process rights, emphasizing that Petitioner was represented by counsel throughout the transcript-reconstruction process and that she was permitted to attend the hearings on the transcript issues.[2] But if *Chessman* is to retain meaning in

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1. *Zavala v. State*, 2004 WL 491132 (Tex. App. March 11, 2004); *Jessup v. State*, 2003 WL 22903017 (Tex. App. Dec. 11, 2003); *Markowitz v. Markowitz*, 118 S.W.3d 82 (Tex. App. 2003). Further, the issue is certainly common in Texas jurisprudence as can be seen from the representative sample of ten cases cited in Petitioner's case by the Texas Court of Criminal Appeals. *Routier v. State*, 112 S.W.3d 554, 570-1 (Tex.Crim.App. 2003). In truth, there are many dozens of reported cases in Texas on the issue of disputed appellate records.

2. *See* Opposition at 12-13 (distinguishing *Chessman* because "neither Routier nor her attorneys were excluded from the proceedings" and asserting without explanation that "Routier was afforded ample opportunity to be heard"); *see also Routier v. Texas*, 112 S.W.2d 554, 572 (Tex. Crim. App. 2003) (holding that federal due process was satisfied "because the appellant and her counsel had notice of the proceedings, were present during the extensive proceedings on the certification of the Simmons record, and were given ample opportunity to make objections to the Simmons record").
(Cont'd)

its most vital context — reconstructing a seriously flawed record in a capital murder case – due process requires more than the opportunity for the defendant and her attorney to sit in the courtroom, silently and helplessly, as the trial judge determines which witnesses to call and what questions to ask them. It requires instead that Petitioner be given notice of the issues to be resolved, be permitted to question the witnesses, and be allowed to present her own witnesses and evidence for the court to consider in reconstructing Petitioner's manifestly defective trial record.

The unambiguous holding of *Chessman* is that the state and the trial court must afford the convicted person a "*voice*" in the reconstruction of a "seriously disputed record." *Chessman*, 354 U.S. at 164 (emphasis added). Like Chessman before her, Petitioner "is entitled to have [her] conviction reviewed upon a record which has been settled in accordance with procedural due process." *Id.* at 164 n.12. The State of Texas and its highest criminal court now take the position that procedural due process is satisfied if the convicted person is represented by an attorney and the trial court holds hearings on reconstructing the record, even if the judge prohibits counsel from calling or examining witnesses. This pretense of due process in no way resembles the "voice" required by this Court in *Chessman*.

In its Opposition, the state claims that "the trial judge afforded Routier all the procedural due process she was

(Cont'd)

In addition to these red herrings, the Opposition has submitted a skewed picture of the facts surrounding this crime in an apparent attempt to engender sympathy for its position. Although actual innocence is not now before this Court, Petitioner maintains her innocence of the crime for which she was convicted.

entitled to" because Petitioner was represented by counsel and the trial court conducted several hearings on the matter. Opposition at 11. But the State refuses to acknowledge the fundamental restrictions that the trial court placed on Petitioner's counsel at those hearings. These restrictions prevented Petitioner from having any meaningful voice in reconstructing the transcript of her trial.

Petitioner was not allowed to call any witnesses, a privilege that the court reserved exclusively for itself. The court permitted Petitioner to submit proposed questions in writing, then decided for itself which questions the witness would be asked. Petitioner was instructed not to object to any questioning during the hearing, was refused permission to cross-examine witnesses, and was prohibited from offering any controverting testimony. SRR 13: 4-7, 39-40. Petitioner objected to these restrictions every step of the way, and the court consistently overruled the objections. Ultimately, after the trial court finally granted Petitioner permission to call witnesses and present their testimony at an evidentiary hearing, the court rescinded that decision by canceling the hearing at the last minute and sending the case back to the Court of Criminal Appeals. *See* App. H to Petition for Certiorari. This fundamentally unfair procedure, calculated to prevent Petitioner from presenting her case or even inquiring into the reconstruction of her appellate record, is the due process that Texas law now enshrines.

The issue before this Court is not a complicated one. When the Court of Criminal Appeals ordered the trial court to review the manifestly defective reporter's record, Petitioner became entitled under *Chessman* to have her voice heard during the process of reconstructing that record. The trial court unconstitutionally deprived Petitioner of her

right to due process by silencing her and her counsel and denying them the opportunity to present their case. The Court of Criminal Appeals affirmed, holding that due process was satisfied simply because Petitioner and her counsel were permitted to sit in the courtroom as a judge who had not even presided over Petitioner's trial certified a brand new record of it. *See Routier*, 112 S.W.3d at 572. But as this Court plainly stated in *Chessman*, "affirmance of petitioner's conviction upon a seriously disputed record, whose accuracy petitioner has had no voice in determining, cannot be allowed to stand." Accordingly, the Court should grant the petition and reaffirm Petitioner's right to be heard in the process of settling her appellate record.

CONCLUSION

For the reasons stated, this Court should grant Petitioner's petition for writ of certiorari.

Respectfully submitted,

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